No. __-_____

IN THE SUPREME COURT OF THE UNITED STATES

DARYL GLENN PAWLAK,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI

APPENDIX

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17-11339

United States Court of Appeals
Fifth Circuit
FILED
August 15, 2019
Lyle W. Cayce
Clerk

UNITED STATES OF AMERICA,

Plaintiff–Appellee,

versus

DARYL GLENN PAWLAK,

Defendant–Appellant.

Appeal from the United States District Court
for the Northern District of Texas

Before SMITH, WIENER, and ELROD, Circuit Judges.

JERRY E. SMITH, Circuit Judge:

Daryl Pawlak was convicted of receipt of child pornography and access with intent to view child pornography involving a prepubescent minor. Pawlak asserts that the district court erred in denying his motions to dismiss the indictment and to suppress evidence, that the evidence was insufficient to sustain his convictions on either count, and that the court clearly erred in applying

a two-level sentencing enhancement for obstruction of justice. Finding no error, we affirm.

I.

A.

In December 2014, federal law enforcement officials learned that a U.S.-based Internet protocol ("IP") address was hosting a website called "PlayPen," which contained a significant amount of child pornography. *United States v. Ganzer*, 922 F.3d 579, 581 (5th Cir. 2019), *petition for cert. filed* (July 23, 2019) (No. 19-5339). The website operated on an anonymity network and was accessible using publicly available software known as The Onion Router ("TOR"). *Id.*

Unlike the traditional Internet, TOR software anonymizes a user's actual IP address (which can be tied to a physical location) by routing the user's connection through a series of randomly selected computers on the network. *Id.* That feature generally makes it impossible for law enforcement officials to identify the administrators and users of websites containing child pornography, such as PlayPen, without employing other investigative techniques. *Id.*

In January 2015, the FBI executed a search warrant and obtained a copy of the server hosting the PlayPen website, which it transferred to a government-controlled facility in Virginia. *Id.* After obtaining a second warrant from a magistrate judge in the Eastern District of Virginia, *id.*, the FBI began a thirteen-day sting operation aimed at unmasking the identities of PlayPen users.[1]

[1] The government notes that although it "did operate the PlayPen site during this brief period of time, it took 'every possible effort to mitigate and prevent any additional physical abuse to children.'" Such efforts included "remov[ing] a portion of the website that encouraged members to produce and post new child pornography."

The operation centered on the use of specialized malware called the Network Investigative Technique ("NIT"). *Id.* "The NIT was a form of malware that augmented the content sent by Playpen to the computers of Playpen users with directions instructing those computers to send identifying information to a computer controlled by the government," *id.*, including "the computer's IP address and when the NIT determined [it]; a unique identifier for the computer generated by the NIT; the type of operating system used by the computer and the operating system's active username . . . ; the computer's host name; and the computer's media access control," *id.* at 581–82. The government further explains that

> [t]he NIT would not deploy onto a PlayPen user's computer until that individual logged into the website (which required them to have the TOR browser, know the 16-character website address,[2] and enter their login information for PlayPen), accessed a certain section in the site, and then actually requested content by clicking on a post in one of the more egregious sections.

B.

Using the NIT, federal agents linked PlayPen user "notsoslow"—later determined to be Daryl Pawlak—with an IP address associated with a residence in Johnson County, Texas. The user had been logged into PlayPen for more than fourteen hours before the NIT deployed on his computer in March 2015, and he had spent an additional hour-and-a-half on PlayPen during the FBI's operation of the website. The NIT also returned Pawlak's computer username ("d.pawlak"), the name of the computer ("Sigma94"), and the computer's MAC address.

On October 1, 2015, after obtaining a search warrant for Pawlak's residence, FBI agents interviewed Pawlak's wife. Using the wife's cell phone,

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[2] The website address was comprised of "a randomly generated stream of [sixteen] characters ending in '.onion.'"

Agent Marya Wilkerson called Pawlak and recorded the conversation. On the call, Pawlak admitted, *inter alia*, that he had downloaded and viewed child pornography using laptops from two different employers, had an email address utilizing the term "notsoslow," had previously used a work computer with the name of "Sigma94," and believed his username on that computer was "d.pawlak." Pawlak also acknowledged that the computer (the "Sigma94 computer") had been in his possession from October 2014 until May 2015, when he returned it to his former employer, Sigma Cubed following his termination.

In the recorded conversation, Pawlak stated that he had initially viewed child pornography approximately three or four years earlier while working for a previous employer. He admitted that he preferred child pornography involving prepubescent females approximately seven to eleven years old, that he often accessed such pornography on a website called "Girls Hub," and that he had last viewed child pornography about one week before.

Later that day, Pawlak and Agent Wilkerson engaged in a second conversation that was not recorded. Pawlak admitted that he had attempted to delete the contents of the hard drive on his current work computer (the "Independence Oil computer") but was unable to do so.

The FBI later acquired the Sigma94 computer from Sigma Cubed. Pawlak was the first and only employee to use the computer, which had remained in a sealed box in Sigma Cubed's offices after he returned it in May 2015. Following a forensic examination, law enforcement officials discovered several images of child pornography in the temporary Internet cache of the Sigma94 computer. The presence of the images in the cache demonstrated that the files came from the Internet, as well as that they were received and stored on the computer. Federal agents also found evidence of seven other images of child pornography on the computer.

In addition, federal agents captured information from when Pawlak accessed the PlayPen website both before and during the thirteen days it was operated by the government. Evidence showed that Pawlak clicked on several posts containing child pornography involving prepubescent female children.

In October 2015, the FBI obtained access to the Independence Oil computer, on which investigators discovered approximately eight hundred images and four videos of child pornography. Pawlak was charged with receipt of child pornography, in violation of 18 U.S.C. § 2252A(a)(2)(A) (Count One), and access with intent to view child pornography involving a prepubescent minor, in violation of 18 U.S.C. § 2252A(a)(5)(B) (Count Two).

Pawlak moved to suppress the evidence obtained using the NIT, as well as all other evidence discovered as a result of its deployment. He claimed that the warrant was void *ab initio* because it violated the scope of the issuing magistrate judge's authority under Federal Rule of Criminal Procedure 41(b). He also moved to dismiss the indictment against him asserting that the government's operation of the PlayPen website constituted outrageous conduct. The district court denied both motions.

Following a three-day trial, a jury convicted Pawlak on both counts. At sentencing, the presentence report recommended a two-level obstruction-of-justice enhancement relating to Pawlak's attempt to delete the contents of the hard drive on his Independence Oil computer. The district court overruled Pawlak's objection to the enhancement. The court sentenced Pawlak to 210 months' imprisonment on each count, to be served concurrently, followed by a supervised release term of fifteen years.

Pawlak raises five issues on appeal. First, he asserts that the district court erred in denying his motion to dismiss the indictment based on outrageous government conduct. Second, Pawlak avers that the court erred in

denying his motion to suppress. Third, he contends that the evidence was insufficient to sustain his conviction for access with intent to view child pornography involving a prepubescent minor (Count Two). Fourth, Pawlak maintains that the evidence was insufficient to support a conviction for receipt of child pornography (Count One). Fifth, Pawlak claims that the district court clearly erred by applying the U.S.S.G. § 3C1.1 obstruction-of-justice enhancement.

II.

Pawlak avers that the district court erred in denying his motion to dismiss. "[W]e review *de novo* whether outrageous conduct requires dismissal of an indictment." *United States v. Sandlin*, 589 F.3d 749, 758 (5th Cir. 2009).

A.

"The due process clause protects defendants against outrageous conduct by law enforcement agents." *United States v. Arteaga*, 807 F.2d 424, 426 (5th Cir. 1986). However, "[g]overnment misconduct does not mandate dismissal of an indictment unless it is so outrageous that it violates the principle of fundamental fairness under the due process clause of the Fifth Amendment." *Sandlin*, 589 F.3d at 758–59 (citation omitted). Consequently, "the outrageous-conduct defense requires not only government overinvolvement in the charged crime but a passive role by the defendant as well. A defendant who actively participates in the crime may not avail himself of the defense." *Arteaga*, 807 F.2d at 427.

We evaluate the government's conduct "in light of the undercover activity necessary to the enforcement of the criminal laws." *United States v. Fortna*, 796 F.2d 724, 735 (5th Cir. 1986) (citation omitted). The outrageous-conduct standard is "extremely demanding," *Sandlin*, 589 F.3d at 758, and "a due process violation will be found only in the rarest and most outrageous circumstances," *Arteaga*, 807 F.2d at 426 (citation omitted).

B.

Pawlak asserts that, for three reasons, the district court erred in denying the motion to dismiss. First, he contends that he was a mere passive participant in the enterprise because "there is no evidence that [he] posted to any forums, communicated with others on the [PlayPen] site, shared information, or in any way produced or uploaded any materials." In doing so, Pawlak attempts to distinguish *United States v. Venson*, 82 F. App'x 330, 332–33 (5th Cir. 2003) (per curiam), in which we rejected an outrageous-conduct defense in a case involving child pornography.

Second, Pawlak maintains that, by operating the PlayPen website, the government aided in the public distribution of child pornography. Therefore, in addition to offending standards of fairness and decency, the government violated federal law.

Third, Pawlak states that the government's actions ignored its internal policies concerning the investigation of Internet crimes because "the FBI took no measures whatsoever to control the replication and distribution of pictures and videos from its undercover website." He also asserts that the government's actions in this case "resulted in the continued victimization of countless innocent children." Consequently, Pawlak contends that because he was a mere passive participant, and the government's overinvolved conduct was outrageous, the court erred in denying the motion to dismiss.

In response, the government maintains that "[t]he district court correctly denied Pawlak's motion to dismiss based on alleged outrageous government conduct given his willing and active participation in the offense." It offers two arguments in support of that position.

First, the government emphasizes that a defendant who actively partakes in a crime cannot avail himself of the outrageous-conduct defense.

Consequently, because Pawlak was "an active, willing, and predisposed child-pornography consumer," he is not entitled to assert that defense. The government points to several Fifth Circuit precedents where, despite an active role played by the government, we rejected the assertion of the outrageous-conduct defense because of the defendant's willing participation.[3]

Pawlak actively viewed child pornography for several years before the FBI's investigation. Before the government's operation of the PlayPen website, Pawlak spent nearly fourteen hours, over a six-month period, logged into the site. Moreover, he continued to seek out such material even after the FBI's PlayPen operation ended. Therefore, the government maintains, the outrageous-conduct defense is not available.

Second, the government emphasizes that we have never invalidated a conviction based on the assertion of that defense. It also notes that we seemingly defined the outer limits of permissible government conduct in *United States v. Tobias*, 662 F.2d 381 (5th Cir. Unit B Nov. 1981).

In *Tobias*, the DEA established a fake chemical-supply company and "placed an advertisement offering over-the-counter sales of chemicals and laboratory equipment." *Id.* at 383. The defendant in that case, Thomas Tobias, placed an order for various chemicals to manufacture cocaine. *Id.* Tobias later tried to cancel the order by telephoning an undercover DEA agent after he determined that cocaine would be too difficult to manufacture. *Id.* Pretending to be sympathetic, the agent suggested that Tobias manufacture phencyclidine ("PCP"). *Id.* at 383–84. Tobias then asked the agent to send him the chemicals necessary to make PCP. *Id.* at 384. After receiving the chemicals and formula

[3] *See United States v. Ivey*, 949 F.2d 759, 769 (5th Cir. 1991); *United States v. Evans*, 941 F.2d 267, 270–71 (5th Cir. 1991) (per curiam); *United States v. Yater*, 756 F.2d 1058, 1066 (5th Cir. 1985).

for PCP, Tobias made more than a dozen calls to the fictitious company for assistance with manufacturing. *Id.* The DEA eventually obtained a warrant and found liquid PCP at Tobias's residence. *Id.*

We rejected Tobias's assertion of the outrageous-conduct defense, finding that he "was a predisposed active participant, motivated solely by a desire to make money." *Id.* at 387. We stressed "that government infiltration of criminal activity is a recognized and permissible means of investigation." *Id.* at 386 (internal quotation marks and citation omitted). Consequently, no due process violation occurred. *See id.* at 387. Nonetheless, we cautioned that the "case does set the outer limits to which the government may go in the quest to ferret out and prosecute crimes in this circuit." *Id.*

Against this backdrop, the government maintains that the FBI's brief sting operation involving the PlayPen website falls well short of the boundaries established in *Tobias*. It notes that "[t]he FBI . . . did not create PlayPen, and . . . it did not alter the site's functionality, add additional child pornography, or actively solicit new users. Rather, the government simply maintained the preexisting structure that Playpen website visitors allegedly used to distribute and receive child pornography among themselves." Accordingly, the government contends it was significantly less active than in *Tobias* because it "only took over an existing site and did not solicit new members." It therefore urges us to affirm the denial of Pawlak's motion to dismiss.[4]

Pawlak fails to establish either prong associated with the outrageous-conduct defense. Concerning the requirement that the defendant play a passive role, the evidence demonstrates that Pawlak was an active consumer of child pornography both before and after the FBI's sting operation. Moreover,

[4] The government stresses that every district court to consider the outrageous-conduct defense in the context of the FBI's operation of the PlayPen website has rejected it.

to access the PlayPen website, a user was required to obtain specialized software, enter a specific sixteen-character website address, and log in using a unique username and password. Because Pawlak was an active participant in the crime, he is not entitled to assert the outrageous-conduct defense on that ground alone. *See Arteaga*, 807 F.2d at 427.

Furthermore, the government's conduct was not outrageous and did not violate fundamental fairness. Viewing the sting operation "in light of the undercover activity necessary to the enforcement of the criminal laws," *Fortna*, 796 F.2d at 735 (citation omitted), the government's conduct does not run afoul of the Fifth Amendment. Here, the FBI received judicial approval to operate the PlayPen site, and it did so for only thirteen days. During that time, the FBI sought to mitigate the further exploitation of children by removing the portion of the site that encouraged members to produce and upload new images of child pornography.

Ultimately, the sting operation successfully targeted a hidden website where thousands of users were viewing a significant amount of child pornography in a nearly untraceable manner. The operation also rescued hundreds of children, including dozens in the United States, from sexual abusers. Therefore, the district court did not err in denying the motion to dismiss.

III.

Pawlak next claims that the district court erred in denying his motion to suppress. "We review the denial of a motion to suppress in the light most favorable to the prevailing party." *United States v. Hernandez*, 670 F.3d 616, 620 (5th Cir. 2012). "The district court's factual findings are reviewed for clear error, and its legal conclusions are reviewed *de novo*." *Id.* "A finding of fact is clearly erroneous if we are left with a definite and firm conviction that a mistake has been committed." *Id.* (internal quotation marks and citation omitted).

"We uphold a district court's denial of a suppression motion if there is any reasonable view of the evidence to support it." *United States v. Contreras*, 905 F.3d 853, 857 (5th Cir. 2018) (internal quotation marks and citation omitted).

A.

"The fact that a Fourth Amendment violation occurred—*i.e.,* that a search or arrest was unreasonable—does not necessarily mean that the exclusionary rule applies." *Herring v. United States*, 555 U.S. 135, 140 (2009). The Supreme Court has "repeatedly rejected the argument that exclusion is a necessary consequence of a Fourth Amendment violation." *Id.* at 141. Accordingly, "[w]hen police act under a warrant that is invalid for lack of probable cause," *id.* at 142, "evidence obtained in objectively reasonable reliance on a subsequently invalidated search warrant typically should not be excluded." *Contreras*, 905 F.3d at 857 (internal quotation marks and citation omitted). Moreover, "a warrant issued by a magistrate normally suffices to establish that a law enforcement officer has acted in good faith in conducting the search." *United States v. Leon*, 468 U.S. 897, 922 (1984) (internal quotation marks and citation omitted).

Nonetheless, there are four circumstances in which an "officer's reliance on the magistrate's probable-cause determination and on the technical sufficiency of the warrant he issues" is not objectively reasonable. *United States v. Cherna*, 184 F.3d 403, 407 (5th Cir. 1999) (citation omitted). First, "if the magistrate or judge . . . was misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard of the truth." *Leon*, 468 U.S. at 923. Second, if the "magistrate wholly abandoned his [neutral and detached] judicial role." *Id.* Third, if the "officer . . . rel[ied] on a warrant [that was] based on an affidavit so lacking in

indicia of probable cause as to render official belief in its existence entirely unreasonable." *Id.* (internal quotation marks and citation omitted). And fourth, if the warrant was "so facially deficient—*i.e.*, in failing to particularize the place to be searched or the things to be seized—that the executing officers cannot reasonably presume it to be valid." *Id.*

"We employ a two-step process for reviewing a district court's denial of a motion to suppress when a search warrant is involved." *Cherna*, 184 F.3d at 407. First, we analyze "whether the good-faith exception to the exclusionary rule" applies. *Id.* If the exception does apply, we affirm the denial of the motion to suppress. *Id.* If it does not, we review whether "the magistrate had a substantial basis for" determining that probable cause existed. *Id.* (citation omitted).

B.

Pawlak raises three arguments in support of his contention that the district court erred in denying his motion to suppress. First, he asserts that the court erred when it declined to require the testimony of Agent McFarlane, the affiant for the NIT warrant application, concerning McFarlane's subjective intent. Second, Pawlak maintains that the court erroneously concluded that the subjective intent of government officials was irrelevant because other courts later found the warrant to be valid.

Third, Pawlak avers that the district court erred because the officers' reliance on the warrant was not objectively reasonable. Pawlak contends that *In re Warrant*, 958 F. Supp. 2d 753 (S.D. Tex. 2013), "put the government on notice that using a warrant issued by a Magistrate Judge in one district to execute malware searches in another is not legal." Consequently, because the government "was fully aware at least two years before it sought the NIT Warrant . . . that [Federal Rule of Criminal Procedure] 41 did not permit

multi-district computer hacking," its agents' reliance on the warrant was not objectively reasonable.

The government responds that Pawlak's focus on "the subjective intent of the officers who secured the NIT Warrant" is misplaced. It asserts that the "good-faith inquiry is confined to the objectively ascertainable question whether a reasonably well trained officer would have known that the search was illegal in light of all of the circumstances" (quoting *Herring*, 555 U.S. at 145). The government also avers that we may "not attempt an expedition into the minds of police officers to determine their subjective belief regarding the validity of the warrant" (quoting *United States v. Payne*, 341 F.3d 393, 400 (5th Cir. 2003)). Consequently, because "Pawlak does not point to any of the *Leon* factors that would suggest the officers failed to act in good faith," the government posits that his "argument should fail."

Moreover, although the district court found that the magistrate judge who initially issued the NIT warrant exceeded the scope of her authority, it also highlighted that several other district courts had reached the opposite conclusion. Therefore, because the matter represented a close legal question, the government contends that it "did not act improperly in seeking th[e] warrant." The government also stresses that because the officers deploying the NIT had no reason to know that the magistrate judge had erred, their reliance on the warrant was objectively reasonable.

Lastly, the government carefully distinguishes this case from *In re Warrant*. It emphasizes that "the information sought to be seized in *In re Warrant* was considerably more extensive and intrusive than the identifying information sought in this case," and it underscores that "a single decision from a magistrate judge in a dissimilar case did not give the government the unambiguous knowledge that such warrants were impermissible." Moreover, "that authori-

ties believed clarification of Rule 41(b) would be helpful does not somehow prove that they knew the NIT Warrant could not validly issue under the circumstances of this case."

Our recent decision in *Ganzer* effectively compels the conclusion that the district court did not err in denying Pawlak's motion to suppress. In that case, we found that the good-faith exception applied to evidence seized because of the NIT warrant, even assuming that the magistrate judge in the Eastern District of Virginia exceeded the scope of her authority. *Ganzer*, 922 F.3d at 587–90. Moreover, we declined to "construe the government's efforts to have Rule 41(b) amended to specifically allow for warrants like the NIT warrant as an admission that such warrants were not previously allowed, but rather as an attempt to clarify an existing law's application to new circumstances." *Id.* at 589.

This case presents factual issues similar to those in *Ganzer*. Consequently, because here, as there, "law enforcement officials involved in the issuance and execution of the NIT warrant acted with an objectively reasonable good-faith belief that their conduct was lawful," *id.* at 590 (internal quotation marks, alteration, and citation omitted), the district court did not err in denying Pawlak's motion. Such a "conclusion is consistent with the holdings of each of our sister circuits to have considered challenges to the NIT warrant." *Id.*[5]

IV.

Pawlak contends that the evidence was insufficient on both counts. We

[5] *See United States v. Moorehead*, 912 F.3d 963, 970–71 (6th Cir. 2019); *United States v. Kienast*, 907 F.3d 522, 528–29 (7th Cir. 2018); *United States v. Henderson*, 906 F.3d 1109, 1119–20 (9th Cir. 2018); *United States v. Werdene*, 883 F.3d 204, 217–18 (3d Cir. 2018); *United States v. McLamb*, 880 F.3d 685, 690–91 (4th Cir. 2018); *United States v. Levin*, 874 F.3d 316, 322–24 (1st Cir. 2017); *United States v. Horton*, 863 F.3d 1041, 1051–52 (8th Cir. 2017); *United States v. Workman*, 863 F.3d 1313, 1317–21 (10th Cir. 2017).

review *de novo* Pawlak's sufficiency claims because he properly preserved the issues by moving for a judgment of acquittal during trial. *United States v. Moreland*, 665 F.3d 137, 148 (5th Cir. 2011). "In deciding whether the evidence was sufficient, we review all evidence in the light most favorable to the verdict to determine whether a rational trier of fact could have found that the evidence established the essential elements of the offense beyond a reasonable doubt." *United States v. Shum*, 496 F.3d 390, 391 (5th Cir. 2007).

A.

Although the government has broad authority to proscribe child pornography, this authority is not unlimited. *United States v. Williams*, 553 U.S. 285, 289 (2008); *see also Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 251–58 (2002). In *Free Speech Coalition*, the Court found that a federal statute banning "the possession and distribution of any visual depiction that is, or appears to be, of a minor engaging in sexually explicit conduct, even if it contained only youthful-looking adult actors or virtual images of children generated by a computer," *Williams*, 553 U.S. at 289 (internal quotation marks and citation omitted), was "overbroad and unconstitutional," *Free Speech Coal.*, 535 U.S. at 258.

The government notes that following *Free Speech Coalition*, defendants in this circuit have challenged their child-pornography convictions by contending "that the government failed to prove the children depicted in the pornography were real, as opposed to 'virtual,' children." We have rejected such a defense, concluding that "*Free Speech Coalition* did not establish a broad requirement that the Government must present expert testimony to establish that the unlawful image depicts a real child." *United States v. Slanina*, 359 F.3d 356, 357 (5th Cir. 2004) (per curiam). "The district court, as the trier of fact . . . , was capable of reviewing the evidence to determine whether the

Government met its burden to show that the images depicted real children." *Id.* Moreover, "[j]uries are still capable of distinguishing between real and virtual images." *Id.* (citation omitted).

B.

Count Two charged Pawlak with access with intent to view child pornography involving a prepubescent minor in violation of 18 U.S.C. § 2252A(a)(5)(B). Pawlak contends that "there was no evidence presented that the representations of children in the images accessed . . . were actual, real children," as opposed to "computer generated or morphed images." Consequently, because "the court's charge only allowed for the conviction upon a finding of child pornography that were images of real or actual children," the evidence introduced "was not sufficient to satisfy the elements of this offense."

The government counters with three points. First, it highlights that we have stated that images of child pornography are themselves sufficient to establish that actual children are depicted. In *United States v. McNealy*, 625 F.3d 858, 865–66 (5th Cir. 2010), a defendant asserted that the factfinder was incapable of ascertaining whether the charged images showed actual children. A government witness testified that he believed that the children depicted in the images were "real minors," *id.* at 865, but "conceded that he did not 'have the ability to look at these images and tell th[e] jury if they'[d] been altered or not,'" *id.*

On appeal, the defendant maintained that the government had failed to satisfy its burden of showing that the images were real. *Id.* We rejected that contention, concluding that "[n]othing in the record, including the images themselves, suggests that they are anything other than images of actual prepubescent children and young teenage girls engaged in what [the defendant] concedes is lewd and lascivious conduct." *Id.* at 866–67. We also highlighted

that "there is no evidence in the record before us that the state of technology is such that images of this nature could have been generated using virtual children." *Id.* at 867. Consequently, "[w]hile it remains the Government's burden to show that actual children were depicted, the images themselves sufficed to authenticate them in this regard." *Id.*

The government also points to testimony from Agent Wilkerson establishing "that *all* of the images the jury had seen to that point, including the Count Two images, and all other images at issue in the investigation of Pawlak, depicted real children." Another government official, Special Agent Daniel Alfin, answered "yes" when asked whether the Count Two images "'appear[ed] to' be real children."

Ultimately, viewing the evidence in the light most favorable to the verdict, the evidence was sufficient to sustain Pawlak's conviction on Count Two. Here, as was the case in *McNealy*, Pawlak points to no evidence in the record demonstrating that the Count Two images were anything other than what the government contended they were: child pornography involving actual prepubescent children. *See id.* at 866–67. Additionally, though it was "the [g]overnment's burden to show that actual children were depicted," here, as in *McNealy*, "the images themselves sufficed to authenticate them in this regard." *Id.* at 867. Consequently, this evidence, coupled with the testimony of Wilkerson and Alfin, was sufficient to support the verdict on this count.

C.

Count One charged Pawlak with receipt of child pornography in violation of 18 U.S.C. § 2252A(a)(2)(A). Pawlak notes that the three images serving as the basis for Count One "were thumbnails found in the temporary internet files, cache location on the Sigma94 computer." Pawlak therefore contends that "[t]he problem with the sufficiency of evidence for these images . . . is that

the government has presented insufficient evidence to show where these items came from; when they were put on the computer; and who actually put the items on the computer."

Pawlak remarks that although he retained possession of the Sigma94 computer while employed by Sigma Cubed, "other employees had access to this computer for extended periods." Moreover, Pawlak acknowledges that he "made some admissions in a telephone conversation with Special Agent Wilkerson," but avers that "this conversation never established that he . . . viewed images on the Playpen website." Consequently, he asserts that because "[t]he government did not present evidence that these specific images were knowingly downloaded or received by Pawlak," the evidence was insufficient to sustain a conviction on this count.

Conversely, the government maintains that Pawlak's confession "to being a long-time consumer of child pornography, . . . a PlayPen member, and . . . particularly interested in images . . . involving prepubescent female children," coupled with the extensive forensic evidence tying him to the images, was sufficient to establish that he knowingly received the images. The government cites two precedents from this circuit in support of its position. In *United States v. Winkler*, 639 F.3d 692, 693 (5th Cir. 2011), we affirmed a defendant's conviction for knowing receipt of child pornography based on images found in his temporary Internet cache. We determined that "[t]he mere presence of the files in the cache is certainly proof that the files were *received*," *id.* at 699 (citation omitted), and we noted that the "inquiry is highly fact specific and not tied to whether the files at issue were found in a cache directory or, alternatively, in the user controlled portion of the hard drive," *id.* Ultimately, we concluded that other evidence introduced by the government established "a pattern of child pornography receipt and possession that could also have caused a rational jury to conclude that [the defendant] knowingly

received the files." *Id.*

Moreover, in *United States v. Larman*, 547 F. App'x 475 (5th Cir. 2013) (per curiam), we affirmed a conviction for receipt of child pornography where images were found in the defendant's temporary Internet cache and he admitted to federal agents that he had downloaded child pornography. *Id.* at 479–81. The government stresses that—similar to the defendant in *Larman*—"Pawlak confessed to a longstanding interest in and consumption of child pornography." As part of his confession—which the government played at trial—"Pawlak indicated he spent approximately half an hour per week consuming child pornography and admitted to accessing it on internet sites." He "also admitted to having the username 'notsoslow' on the PlayPen website and to having a computer named 'Sigma94' with a username of 'd.pawlak' while working at Sigma Cubed, tying him to the computer which downloaded the images."

The government contends that "[l]ike the defendant in *Winkler*, the evidence showed Pawlak was a member of a website dedicated to child pornography and that he consumed a great deal of other child pornography, evincing a pattern of child-pornography receipt." Moreover, "like the defendant in *Larman*, Pawlak *confessed* to obtaining child pornography over the internet."

Ultimately, the evidence was more than sufficient to sustain the conviction on Count One. Images of child pornography were found on Pawlak's computer in his temporary Internet cache. Pawlak admitted, in a recorded conversation, to be being a long-time consumer of child pornography, and he was a member of PlayPen, a website dedicated to child pornography. Accordingly, viewed in the light most favorable to the verdict, this evidence sufficed to establish Pawlak's knowing receipt of child pornography.

V.

Pawlak maintains that the district court clearly erred in applying the obstruction enhancement. Because Pawlak specifically objected, we review the "district court's interpretation or application of the Sentencing Guidelines" *de novo*. *United States v. Adam*, 296 F.3d 327, 334 (5th Cir. 2002). We review the court's factual findings, including a finding of obstruction of justice, for clear error. *Id*. "Where a factual finding is plausible in light of the record as a whole, it is not clearly erroneous. Unless left with the definite and firm conviction that a mistake has been committed, [we] will not deem the district court's finding to be clearly erroneous." *Id*. (internal quotation marks and citation omitted).

A.

Section 3C1.1 of the U.S. Sentencing Guidelines, a sentencing adjustment for obstructing or impeding the administration of justice, provides that

> [i]f (1) the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice with respect to the investigation, prosecution, or sentencing of the instant offense of conviction, and (2) the obstructive conduct related to (A) the defendant's offense of conviction and any relevant conduct; or (B) a closely related offense, increase the offense level by 2 levels.

The application notes to the obstruction enhancement emphasize that, *inter alia*, "destroying or concealing . . . evidence that is material to an official investigation or judicial proceeding (*e.g.*, shredding a document or destroying ledgers upon learning that an official investigation has commenced or is about to commence), or attempting to do so" qualifies as "the type[] of conduct to which this adjustment applies." U.S.S.G. § 3C1.1 cmt. n.4(D).

B.

Pawlak avers that, for two reasons, the district court clearly erred in applying the obstruction enhancement. First, as Pawlak reads it, application

note 4(D) supports his position that his conduct does not amount to obstruction of justice because the attempt to erase his hard drive occurred contemporaneously with his arrest. *See id*. (stating an exception, under some circumstances, for conduct that "occurred contemporaneously with arrest" and was not "a material hindrance" to the investigation). Second, Pawlak contends that the mere act of searching for and downloading software designed to wipe a computer hard drive, without deploying it, does not constitute obstruction of justice. Consequently, because "he did not actually deploy the program and his conduct did not materially hinder the investigation and prosecution of the case," the court clearly erred.

In response, the government asserts that "[t]he district court did not clearly err in enhancing Pawlak's offense level for obstruction of justice because the evidence, including his confession, established that he downloaded a program meant to erase a computer hard drive containing a cache of child pornography." The government highlights that "after the FBI commenced its search-warrant execution . . . Pawlak searched for a program meant to wipe his hard drive." Pawlak later admitted to an FBI agent that he was unable to execute the program because he lacked an external drive necessary to utilize it. After examining the Independence Oil computer, a forensic computer expert confirmed that the software had been downloaded and installed on the same morning that the FBI executed a search warrant at Pawlak's residence. The government therefore contends that Pawlak fails "to show any error, much less clear error, in the district court's application of the obstruction enhancement based upon the concrete steps he took towards deleting material evidence from his computer after his conversation with" the FBI agent executing the search warrant.

The court did not clearly err in applying the obstruction enhancement. The evidence demonstrates, and Pawlak readily admits, that he took affirma-

tive steps to download a program aimed at permanently deleting the contents of the Independence Oil computer hard drive, including more than eight hundred images and four videos of child pornography. The successful deployment of that program would have deleted material evidence from the hard drive, thereby hindering the investigation. *See* U.S.S.G. § 3C1.1 cmt. n.4(D). That Pawlak was ultimately unsuccessful in deploying it is irrelevant: A defendant also qualifies for the enhancement when he merely attempts to obstruct justice. *Id.* § 3C1.1; *see also id.* § 3C1.1 cmt. n.4(D).

Moreover, Pawlak's attempt to obstruct justice was not contemporaneous with his arrest. Instead, he attempted to wipe his hard drive shortly after he learned that federal agents were searching his house. *Cf. id.* § 3C1.1 cmt. n.4(D). Consequently, the district court did not clearly err in applying the two-level obstruction enhancement.

AFFIRMED.

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE,
Suite 115
NEW ORLEANS, LA 70130

August 15, 2019

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW

Regarding: Fifth Circuit Statement on Petitions for Rehearing or Rehearing En Banc

No. 17-11339 USA v. Daryl Pawlak
USDC No. 3:16-CR-306-1

Enclosed is a copy of the court's decision. The court has entered judgment under FED. R. APP. P. 36. (However, the opinion may yet contain typographical or printing errors which are subject to correction.)

FED. R. APP. P. 39 through 41, and 5TH Cir. R.s 35, 39, and 41 govern costs, rehearings, and mandates. **5TH Cir. R.s 35 and 40 require you to attach to your petition for panel rehearing or rehearing en banc an unmarked copy of the court's opinion or order.** Please read carefully the Internal Operating Procedures (IOP's) following FED. R. APP. P. 40 and 5TH CIR. R. 35 for a discussion of when a rehearing may be appropriate, the legal standards applied and sanctions which may be imposed if you make a nonmeritorious petition for rehearing en banc.

Direct Criminal Appeals. 5TH CIR. R. 41 provides that a motion for a stay of mandate under FED. R. APP. P. 41 will not be granted simply upon request. The petition must set forth good cause for a stay or clearly demonstrate that a substantial question will be presented to the Supreme Court. Otherwise, this court may deny the motion and issue the mandate immediately.

Pro Se Cases. If you were unsuccessful in the district court and/or on appeal, and are considering filing a petition for certiorari in the United States Supreme Court, you do not need to file a motion for stay of mandate under FED. R. APP. P. 41. The issuance of the mandate does not affect the time, or your right, to file with the Supreme Court.

Court Appointed Counsel. Court appointed counsel is responsible for filing petition(s) for rehearing(s) (panel and/or en banc) and writ(s) of certiorari to the U.S. Supreme Court, unless relieved of your obligation by court order. If it is your intention to file a motion to withdraw as counsel, you should notify your client promptly, **and advise them of the time limits for filing for rehearing and certiorari**. Additionally, you MUST confirm that this information was given to your client, within the body of your motion to withdraw as counsel.

Sincerely,

LYLE W. CAYCE, Clerk

Deborah M. Graham

By: _____
Debbie T. Graham, Deputy Clerk

Enclosure(s)

Mr. Christopher Allen Curtis
Mr. Jason Douglas Hawkins
Mr. Joseph Andrew Magliolo
Mr. Kevin Joel Page
Ms. Leigha Amy Simonton

APPENDIX B

United States District Court

NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

UNITED STATES OF AMERICA

v.

DARYL GLENN PAWLAK

JUDGMENT IN A CRIMINAL CASE

Case Number: **3:16-CR-00306-D(1)**
USM Number: **54530-177**
Steven Todd Jumes
Defendant's Attorney

THE DEFENDANT:

☐	pleaded guilty to count(s)	
☐	pleaded guilty to count(s) before a U.S. Magistrate Judge, which was accepted by the court.	
☐	pleaded nolo contendere to count(s) which was accepted by the court	
☒	was found guilty on count(s) after a plea of not guilty	**1 and 2 of the superseding indictment filed on May 17, 2017.**

The defendant is adjudicated guilty of these offenses:

Title & Section / Nature of Offense	Offense Ended	Count
18 U.S.C. § 2252A(a)(2)(A) and (b)(1) Receipt of Child Pornography	05/01/2015	1
18 U.S.C. § 2252A(a)(5)(B) and (b)(2) Access with Intent to View Child Pornography Involving a Prepubescent Minor	02/20/2015	2

The defendant is sentenced as provided in pages 2 through 8 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s)

☒ It is ordered that the original indictment is dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

November 9, 2017
Date of Imposition of Judgment

Signature of Judge

SIDNEY A. FITZWATER
UNITED STATES DISTRICT JUDGE
Name and Title of Judge

November 15, 2017
Date

DEFENDANT: DARYL GLENN PAWLAK
CASE NUMBER: 3:16-CR-00306-D(1)

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of:

two hundred ten (210) months on counts 1 and 2.

It is ordered that the sentences on counts 1 and 2 shall run concurrently with one another, except as to the mandatory special assessments, which shall run consecutively.

☒ The court makes the following recommendations to the Bureau of Prisons:

that the defendant be assigned to FCI-Seagoville, if eligible.

☒ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at ☐ a.m. ☐ p.m. on

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on
☐ as notified by the United States Marshal.
☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to

at _____, with a certified copy of this judgment.

UNITED STATES MARSHAL

By
DEPUTY UNITED STATES MARSHAL

DEFENDANT: DARYL GLENN PAWLAK
CASE NUMBER: 3:16-CR-00306-D(1)

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of: **fifteen (15) years.**

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.
   - ☒ The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. (*check if applicable*)
4. ☐ You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. *(check if applicable)*
5. ☒ You must cooperate in the collection of DNA as directed by the probation officer. (*check if applicable*)
6. ☐ You must comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, et seq.) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which you reside, work, are a student, or were convicted of a qualifying offense. (*check if applicable*)
7. ☐ You must participate in an approved program for domestic violence. (*check if applicable*)

You must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

DEFENDANT: DARYL GLENN PAWLAK
CASE NUMBER: 3:16-CR-00306-D(1)

STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. I understand additional information regarding these conditions is available at www.txnp.uscourts.gov.

Defendant's Signature _____ Date _____

DEFENDANT: DARYL GLENN PAWLAK
CASE NUMBER: 3:16-CR-00306-D(1)

SPECIAL CONDITIONS OF SUPERVISION

The defendant must comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, et seq.) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which the defendant resides, works, is a student, or was convicted of a qualifying offense.

The defendant shall participate in sex offender treatment services as directed by the probation officer until successfully discharged. These services may include psycho-physiological testing (i.e., clinical polygraph, plethysmograph, and the ABEL screen) to monitor the defendant's compliance, treatment progress, and risk to the community. The defendant shall contribute to the costs of services rendered (copayment) at a rate of at least $15 per month.

Without prior permission from the Court or probation officer, the defendant shall have no unsupervised communication or contact with persons under the age of 18; the defendant shall not be at or near places where minors congregate, nor shall the defendant create an opportunity for minors to congregate; the defendant shall not be employed or be a volunteer at places where minors congregate; and the defendant shall not befriend someone who has minors.

The defendant shall neither possess nor have under his control any sexually oriented, or sexually stimulating materials of adults or children. This includes visual, auditory, telephonic, electronic media, email, chat communications, instant messaging, or computer programs. The defendant shall not patronize any place where such material or entertainment is available. The defendant shall not use any sex-related telephone numbers.

The defendant shall not have any form of unsupervised contact with persons under the age of 18 at any location, including, but not limited to, the defendant's residence, place of employment, and public places where persons under the age of 18 frequent or congregate, without prior permission of the probation officer.

The defendant shall participate and comply with the requirements of the Computer and Internet Monitoring Program, contributing to the cost of the monitoring in an amount not to exceed $40 per month. The defendant shall consent to the probation officer's conducting ongoing monitoring of his computers. The monitoring may include the installation of hardware and/or software systems that allow evaluation of computer use. The defendant shall not remove, tamper with, reverse engineer, or circumvent the software in any way. The defendant shall only use authorized computer systems that are compatible with the software and/or hardware used by the Computer and Internet Monitoring Program. The defendant shall permit the probation officer to conduct a preliminary computer search prior to the installation of software. At the discretion of the probation officer, the monitoring software may be disabled or removed at any time during the term of supervision.

The defendant shall submit to periodic, unannounced examinations of his computers, storage media, and/or other electronic or Internet-capable devices, performed by the probation officer at reasonable times and in a reasonable manner based on reasonable suspicion of contraband evidence of a violation of supervision. This may include the retrieval and copying of any prohibited data and/or the removal of such system for the purpose of conducting a more thorough inspection. The defendant shall provide written authorization for release of information from the defendant's Internet service provider.

DEFENDANT: DARYL GLENN PAWLAK
CASE NUMBER: 3:16-CR-00306-D(1)

SPECIAL CONDITIONS OF SUPERVISION

The defendant shall not use any computer other than the one the defendant is authorized to use without prior approval from the probation officer.

The defendant shall not use any software program or device designed to hide, alter, or delete records and/or logs of the defendant's computer use, Internet activities, or files stored on the defendant's computer.

The defendant shall not use any computer or computer-related equipment owned by his employer, except for the strict benefit of his employer in the performance of his job-related duties.

The defendant shall provide the probation officer with accurate information about his entire computer system. The defendant's email shall only be accessed through a pre-approved application.

The defendant shall not install new hardware, perform upgrades, or effect repairs on his computer system without the prior permission of the probation officer.

The defendant shall not maintain or create a user account on any social networking site (i.e., MySpace.com, Facebook.com, Adultfriendfinder.com, etc.) that allows access to persons under the age of 18, or allows for the exchange of sexually-explicit material, chat conversations, or instant messaging. The defendant shall neither view nor access any web profile of users under the age of 18.

Without prior approval from the probation officer, the defendant shall not use or possess a web cam or any other hardware that allows for the exchange of video or photographs online.

The defendant shall not use or own any device that allows Internet access other than authorized by the probation officer. This includes, but is not limited to, PDAs, electronic games, and cellular/digital telephones.

The defendant shall not engage in or utilize any service that allows peer-to-peer file sharing or file transfer protocol activity.

The defendant shall not possess or use removable media configured with bootable operating systems.

The defendant shall not access any Internet Service Provider account or other online service using someone else's account, name, designation, or alias.

DEFENDANT: DARYL GLENN PAWLAK
CASE NUMBER: 3:16-CR-00306-D(1)

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	JVTA Assessment*	Fine	Restitution
TOTALS	$200.00	$.00	$.00	$.00

☐ The determination of restitution is deferred until An *Amended Judgment in a Criminal Case (AO245C)* will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

☐ Restitution amount ordered pursuant to plea agreement $

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ the interest requirement is waived for the ☐ fine ☐ restitution

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22
** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: DARYL GLENN PAWLAK
CASE NUMBER: 3:16-CR-00306-D(1)

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A ☒ Lump sum payments of $200.00 due immediately, balance due

☐ not later than , or

☐ in accordance ☐ C, ☐ D, ☐ E, or ☐ F below; or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or

C ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after the date of this judgment; or

D ☐ Payment in equal 20 *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ *(e.g., 30 or 60 days)* after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☐ Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several
See above for Defendant and Co-Defendant Names and Case Numbers *(including defendant number)*, Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

☐ Defendant shall receive credit on his restitution obligation for recovery from other defendants who contributed to the same loss that gave rise to defendant's restitution obligation.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) JVTA Assessment, (8) penalties, and (9) costs, including cost of prosecution and court costs.

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17-11339

UNITED STATES OF AMERICA,

Plaintiff - Appellee

v.

DARYL GLENN PAWLAK,

Defendant - Appellant

Appeal from the United States District Court
for the Northern District of Texas

ON PETITION FOR REHEARING EN BANC

(Opinion August 15, 2019, 5 Cir., 8-15-19, 935 F.3d 337)

Before SMITH, WIENER, and ELROD, Circuit Judges.

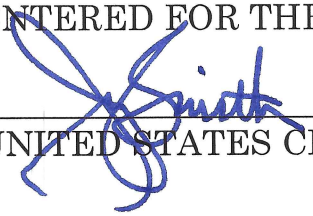
PER CURIAM:

(✓) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court

having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:



UNITED STATES CIRCUIT JUDGE

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE,
Suite 115
NEW ORLEANS, LA 70130

October 01, 2019

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW:

No. 17-11339 USA v. Daryl Pawlak
USDC No. 3:16-CR-306-1

Enclosed is a copy of the Court's order.

See FRAP and Local Rules 41 for stay of the mandate.

Sincerely,

LYLE W. CAYCE, Clerk

By: _____
Melissa B. Courseault, Deputy Clerk
504-310-7701

Mr. Christopher Allen Curtis
Mr. Jason Douglas Hawkins
Mr. Joseph Andrew Magliolo
Mr. Kevin Joel Page
Ms. Leigha Amy Simonton